# EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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| WEISS, ET AL., Plaintiffs, | ) | 05-CV-04622 (DLI) |
| V. | ) | United States Courthouse Brooklyn, New York |
| NATIONAL WESTMINSTER BANK, Defendant. | ) | THURSDAY, SEPTEMBER 15, 2016 |

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE DORA L. IRIZARRY
CHIEF UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography, transcript produced by computer-assisted transcript.

THE CLERK: Civil Cause for Oral Argument, Docket Numbers 05CV4622, Weiss, et al. versus National Westminster; Docket Number 06CV702, Strauss versus Credit Lyonnais; Docket Number 07CV914, Wolf versus Credit Lyonnais; and Docket Number 06CV916, Applebaum versus National Westminster.

Please state your appearances.

MR. OSEN: Good morning, your Honor.

THE COURT: Good morning.

MR. OSEN: Gary Osen for the Strauss and Weiss plaintiffs. With me this morning are Ari Unger and Aaron Schlanger from Osen LLC; as well, my colleague Tab Turner from Turner & Associates; and Shawn Naunton from Zuckerman Spaeder.

THE COURT: Good morning.

There is a young lady in the back that was not introduced. Good morning.

MS. DAVIES: Yes. Good morning, your Honor. I'm Susan Davies with Stone Bonner & Rocco, for counsel for the Plaintiff, Wolf and Applebaum cases.

THE COURT: Thank you. Good morning to all of you.

For the defendants.

MR. FRIEDMAN: Good morning, your Honor. Lawrence Friedman, Cleary Gottlieb Steen & Hamilton, on behalf of the defendants Credit Lyonnaise and National Westminster Bank. And with me are colleagues Jonathan Blackmon, Avram Luft, Mark McDonald, Molly Calkins, and Mark Grube.

THE COURT: Good morning to all of you. And some of you I have seen before, the last time that we had a very fascinating oral argument on some of the litigation here. And I'm going to -- I know it's contrary to what all of you are used to in your practice of standing when you address the Court, but I am going to ask you please to remain seated and speak into the microphones, just because sometimes it's difficult for me and the reporter to hear, and for everybody else in the courtroom to hear one another. So I apologize in advance if it's contrary to your habit; I prefer a clearer record.

So the plaintiffs had made a motion to consolidate all of these cases for trial, and we are finally closer to the road to trial, although there are still additional motions that the defense wishes to make, and I believe that a briefing schedule has already been put in place. And then I have to say the parties have been working very diligently and very hard throughout the history of these cases. To the public eye, it may not appear so, because these cases have been around for so long.

But there has been a significant amount of discovery and motion practice, and waiting for the Supreme Court and the 2nd Circuit to render decisions, and for NatWest to go up to the Circuit on appeal, and there was some wait for that. It's been just that sort of a protracted road getting us to this

point.

I thought based on the submissions of the parties that that was sufficient enough for the Court to be able to, at least preliminarily, form an opinion as to a decision on the motion to consolidate, but I did want to give the parties an opportunity for some oral argument, if there was anything that you wanted to add to what was already in the submissions that were made to the Court. And so this is plaintiffs' motion, so I'm happy to give plaintiffs a few minutes, if there's anything that you would like to say in support of the motions to consolidate.

MR. OSEN: Thank you. Good morning, Judge.

THE COURT: Good morning again.

MR. OSEN: Let me make sure my microphone is working. Gary Osen for the Strauss and Weiss plaintiffs. I'm going to address the basic considerations from our standpoint, and I'm going to also turn the microphone over to my colleague, Mr. Turner, if that's okay with the Court --

THE COURT: Sure.

MR. OSEN: -- to add some additional contacts based on your experience in the Arab Bank trial.

THE COURT: Right.

MR. OSEN: Okay. So, obviously, your Honor's familiar with the legal standard under Rule 42, so I won't belabor that point. All of these cases -- and, in that sense,

I'm referring to the consolidated Weiss, and I believe it's Applebaum, and Strauss, and Wolf cases --

THE COURT: Right.

MR. OSEN: -- they all involve the same application of law. The claims are based on the ATA violations of Section 2339(B) of the material support statute. They substantially involve the same attacks. There are 19 attacks in Credit Lyonnais and 17 in NatWest, so there are two additional attacks in the Credit Lyonnais case, but they're all involving HAMAS. The proof of HAMAS' responsibility for those 17 and 19 attacks respectively are identical. That is to say from -- it doesn't matter who the plaintiff is or what the caption of the case is, the evidence and the experts, the plaintiffs have designated to prove those attacks are the same.

The same may be said as well for a substantial portion of the approximate cause element of the claim in all of the cases. As I mentioned a moment ago, for HAMAS attribution, the plaintiffs' experts are Evan Coleman and Dr. Ronny Shaked (phonetic), and the defendant's experts, both case in chief and rebuttal, are essentially the same on these issues. So approximate cause, which -- you know, can be described a couple of different ways, but we think of it primarily as the question of whether or not the banks actually transmitted funds to HAMAS or HAMAS-controlled organizations. And there, again, the experts on both sides are exactly the

same in Strauss and Weiss cases and between Credit Lyonnais and NatWest. Typically, we would offer Dr. Levit --

THE COURT: But the offense that transpired in terms of how the banks responded to the various different accounts that are at issue here was vastly different. The approach by NatWest was vastly different from the approach that was taken by Credit Lyonnais, and there's going to have to be by necessity additional witnesses from the banks themselves and, perhaps, from other persons that were involved in the investigation of these matters. And so those are going to be substantially different witnesses; there are going to be far more numerous witnesses than the expert testimony concerning the attacks themselves, which is far more limited in nature.

In NatWest, for example, there was a significant involvement by the British government. Her Majesty's Treasury was involved. The Parliament was involved. That's not the same case with respect to Credit Lyonnais. And so it's not necessarily clear to me, that given the difference in not only the quantity of the evidence but the type of evidence that's going to be submitted in connection with the defense of the claims, that it wouldn't cause jury confusion.

MR. OSEN: Let me address that, your Honor. I agree completely with your characterization as it relates to the issue you're addressing, which is state of mind, which is the third element in the claim. And so on that issue, which is,

of course --

THE COURT: But it also affects approximate proof as to approximate cause. Its not just the scienter element, but it's also the approximate cause. When did NatWest become aware that this was an FTO? When did Credit Lyonnais become aware that these were FTOs? Were they in fact FTOs at the time that the accounts were had? These are different time frames. These are different -- very different situations and, again, very different reactions to those occurrences.

MR. OSEN: We don't dispute that, your Honor. As far as how the banks responded to that, the fact scenarios for each one of them is distinct, but we think that makes it easier for a jury to address the culpability of the banks separately within the same trial. Mr. Turner can address the question in terms of the practical time in our experience that these various components of liability take in the context of the trial. But what you've described is entirely accurate as to the differentials, if you will, in the evidence and both affirmatively and from the defense standpoint.

But, again, because you don't have substantial overlap or interaction between the defendants in their conduct -- there are a handful of transactions which Credit Lyonnais transferred money to Interpal's account and NatWest, but aside from that it's not as if the e-mail traffic or the testimony, one touches upon the other, so they're very

distinct. And I think from a standpoint of consolidation, if the question is judicial efficiency, or prejudice, or the potential for confusion, the advantage and the efficiency of not litigating 19 attacks, not litigating approximate cause of whether or not these so-called charities were in fact controlled by HAMAS, that's a substantial part of the plaintiffs' case.

And that would otherwise have to be repeated with the -- not only the expense and the taxing of limited judicial resources, but it would also cause delay and risk the possibility of different juries hearing the exact same evidence on these issues coming out differently. So from our standpoint, we don't see the prospect of confusion --

THE COURT: But isn't that the same thing with the other cases, with Arab Bank, and with some of the other banks that have been the subject of this same type of the litigation, both here in this district and in the Southern District? It's generally the same organizations that are -- or similar organizations that are involved.

MR. OSEN: That's true, your Honor.

THE COURT: Because it's not just a question of whether these are in fact terrorist organizations, but there's a real distinct timing element as to when they were declared FTOs, when the banks became aware of the existence of those accounts. You know, they weren't being -- these accounts

weren't being booked as accounts for HAMAS; they were being booked as charitable organizations, and in some sense, you know -- and I'm not saying this as I've determined these facts to be so. These are obviously allegations that have to be proven at trial.

But just taking them from the papers, they were in some sense, at least from the plaintiffs' sense, a disguised front, right, for HAMAS, because ultimately those accounts were being used to fund HAMAS activities. But it was done in a way that, perhaps, from the bank's perspective -- and as defense for the banks, whether it's Credit Lyonnais or NatWest, it posed certain issues with respect to when they became aware, and how promptly they acted, and whether they acted sufficiently and efficiently, or within the confines of their legal obligations, whether it's the Unites States' obligation, or the British obligations, and so on, or French obligations.

MR. OSEN: We agree with that, your Honor. The state of mind aspect of this, and what did they know about the customer, what did they know about where the money was going is idiosyncratic, if you will, to each defendant, and those circumstances are unique to them. But, again, I think that speaks to the fact that a jury --

THE COURT: How much time would it take for the experts to testify about the various attacks? How much time

are we talking about?

MR. TURNER: I can address that, your Honor.

THE COURT: Thank you, Mr. Turner.

MR. TURNER: Based on the unique experience gained from the Linde versus Arab Bank case, if you do a comparative analysis in the Linde case, the Arab Bank case, it involved 24 separate attacks, all allegedly carried out by HAMAS, and ultimately found by the jury to have been carried out by HAMAS. These two cases, Credit Lyonnais involves 19 attacks, and NatWest involves 17 attacks. In the Arab Bank case, we were able to put on testimony pertaining to the attacks themselves, all 24 attacks, and in what amounted to about 4 days of testimony.

THE COURT: Now, these 24 attacks, were those the same attacks that are involved in NatWest and Credit Lyonnais, or were they different attacks?

MR. TURNER: They were the same attacks.

THE COURT: The same attacks.

MR. TURNER: And so as a consequence, we feel pretty comfortable that putting on evidence -- whether you count it as 19 or whether you count it as 36, we're fairly confident that being able to put on the attack part of the case --

THE COURT: It wouldn't be 36, because basically 17 -- there's an overlap of 17, so there's no overlap of evidence. You have two additional.

MR. TURNER: Sure. But if you do them twice, in other words, we have two trials, one as to NatWest and one as to Credit Lyonnais, then you're basically putting on 37 because you're repeating yourself.

THE COURT: Sorry to interrupt you, but how much time did it take in the Arab Bank case to try the liability issues?

MR. TURNER: By liability, I presume you're referring to --

THE COURT: Approximate cause and the scienter.

MR. TURNER: Roughly speaking -- and the numbers bear this out -- the number of Arab Bank witnesses deposed for purposes of discovery in that case were 24; in Credit Lyonnais, there were 30; and in NatWest, there were 19. In the Arab Bank case, we used 50 percent of those witnesses at trial that amounted to one-and-a-half days testimony. So roughly speaking, there was one-and-a-half days of trial devoted to the deposition testimony alone. Now, that's separate and apart, of course, from the expert witnesses that testified as to both of those issues, both approximate cause and scienter.

THE COURT: And how long was that testimony?

MR. TURNER: That testimony lasted roughly -- five days of testimony, and that included cross-examination.

THE COURT: I was sort of assuming it would take

everything, direct and cross.

MR. TURNER: That is correct.

THE COURT: All right.

MR. TURNER: Now, the fundamental proposition, at least as I understand the arguments made by the banks for desiring to have separate trials, is that it is too confusing and prejudicial to have multiple defendants from the same accident or attacks in the same courtroom and a jury trying to decide those issues, but that's contrary to my experience. On a routine basis in civil cases, we have multiple-defendant cases, whether it's involving a drug, or whether it's involving legal malpractice, or medical malpractice, or medical malpractice.

As a good example, oftentimes we have medical malpractice cases where there's hospitals and three doctors all tried at the same time, for the same events, all involving separate conduct, all involving separate knowledge, all involving separate acts, separate conduct, separate medical records, all tried at the same time. And the jury is asked to apportion fault on each one of those based upon their own misconduct, or alleged misconduct, rather than the conduct of others.

And we see very successfully that juries on a very routine basis handle these kinds of issues quite easily, and apportion fault in some instances, recognizing -- this is not

a comparative false situation; it is separate fault. But juries all the time not only consider the evidence, but they even go one step further and they compare the fault one among the other, so I think it's a --

THE COURT: But that's the problem here, because you can't -- the jury in fact is prohibited, or would be prohibited, from saying, well, Credit Lyonnais was at fault here; therefore, NatWest should also be at fault. And, again, both banks took very different approaches. And as I sit here, I'm the one tasked with giving instructions to the jury, and I have given a lot of thought about the -- one of the other arguments used in support of the motion, that the Court could give some sort of limine instruction.

The one thing I always try to avoid as a judge, and tried to avoid as a state judge, as much as I try to avoid as a federal judge is marshalling the evidence for the jury, because you start going down a very slippery slope when you do that. And it seems to me that that could create some real difficulty here in that regard.

MR. TURNER: And there's no question about that. If you go back, and you take a look at the case law on this particular issue that we're debating today, most of the case law, as you know, comes out of the criminal context rather than the civil context, because we don't see these kinds of motions very often in civil cases.

THE COURT: Right.

MR. TURNER: We see them most often in criminal cases.

THE COURT: Right.

MR. TURNER: And the key factors that the Court seems to focus on -- the appellate courts at least seem to focus on -- is that in fact consolidation for trial is always a discretionary issue with the judge, and it's a balance between the efficiency and the timing of the system versus the potential prejudice and confusion of the issues to the jury, prejudice to the parties and confusion for the jury.

And the key factors that seem to go into an analysis of these issues in the criminal context is whether or not there is antagonistic defenses, and that has been defined under the law as not being different defenses. That has been one blaming the other. We don't have that in this situation. We don't have allegations in this case nor testimony in this case with Credit Lyonnais blaming NatWest or NatWest blaming Credit Lyonnais as being the one responsible.

So when you begin to take off the factors considered by the Court, antagonistic defenses don't apply. Well, complexity doesn't really apply here either, because complexity is broken down into -- at least according to the case law, either there's a huge number of defendants, which we don't have here -- we only have two -- or the issues in the

witnesses are so disparate and so different among the two defendants -- for instance, in most of the cases where the appellate courts have found that severance should have been granted, you had one defendant who had one witness, very little involvement, and you had another defendant who had 47 witnesses and was primarily involved, and there was such a huge difference.

Here we have 19 attacks. We have 17 attacks. We've got practically the same number of witnesses on both. And all of the case law that I have taken a look at -- and I have read both briefs, and I have done some independent research, and in addition to that, reading some other cases -- one of the things that the courts always seem to note is the courts, in allowing the district court discretion to do this, gives the district court a variety of tools with which to work with in ensuring that there's no prejudice, and that any confusion is limited, and that includes limine instructions.

That includes jury instructions that make it quite clear what the questions are that are being asked of them at the end of the trial; very clear limine instructions during various parts of the testimony in the case, ensuring that the jury understands that the evidence is being restricted to this particular issue or that particular issue or this particular defendant or that particular defendant. All of those tools are available to the court if the court so desires and finds

that it's reasonable. But the one thing that makes no sense in the arguments from the banks is that these issues are so complex and so confusing that juries can't comprehend what's going on.

Because our civil justice system does this on a daily basis; we ask jurors to try six and seven defendants in civil cases on a routine basis. They're able to listen to the evidence; they're able to ferret out what's important to an individual defendant. And the one thing that cuts against all of this is having to try these nineteen or seventeen attacks twice.

THE COURT: I understand.

MR. TURNER: That just makes no sense.

THE COURT: I understand that, but there were two other points -- and then I'm going to give the floor over to defense -- that I'd like to hear. The defense raised an argument that they may need to forego having defense counsel represent both clients at the trial, which, of course, is -- especially at this juncture, in the case, would be a pretty hard burden for any case. I'm sure that plaintiffs' counsel can imagine how their clients would feel if, at this juncture, you have to tell them I can't go forward with this; we're going to have to get another attorney, putting yourselves in that client's shoes.

But, also, even given, Mr. Turner, what you have

said here, sometimes in -- and you're right; there's a lot of analogy to criminal cases, and sometimes in criminal cases the court has to consider where certain defenses by one defendant might have a negative spillover to the codefendant. And sometimes -- even though severance is very rarely granted in the criminal context, especially in federal court, sometimes it is warranted, because there might be a negative spillover effect on the codefendant.

I certainly can see the possibility where there might be some undue prejudice to the Credit Lyonnais defendant based on the evidence that I expect will be introduced by NatWest about the lengths to which they went to investigate the accounts and -- just forgive me, because I'm going by my recollection of the facts in the case, but to promptly close accounts, and, in fact, the involvement of the government itself in the investigation of the matter, both by the treasury and by Parliament, to the point where -- at least in this humble district court judge's view -- I thought that a summary judgment was warranted, and I have to tell you it was not a decision that I came to very lightly, under the circumstances here.

I never come to that decision lightly in any summary judgment motion case, in any case, because under our system of laws we want people to have their day in court; we want them to be able to have their due process, and so it's something

that we do very carefully. And the Circuit disagreed, and so we have that case back, and we'll proceed accordingly. By contrast, I also have a summary judgment motion by the Credit Lyonnais defendant, and I thought that there were material issues of fact that needed to be determined by the jury based on a different set of circumstances there.

There were delays in responding. There was a certain level -- and, again, I don't want to -- I'm not making any sort of judgments about anything, but the opinion said this --

MR. TURNER: Of course.

THE COURT: -- that there was some carelessness, if you will, or lack of attention to the fact that some accounts, while they said should be closed at a certain period of time, were not in fact closed, and deposits continued to be made. There was sort of a more lax approach, if you will, and who's to say that the jury looking at that says, well, wait a minute; NatWest did all of this, so how come this bank couldn't do this? And why didn't they do this?

And in that sense, perhaps, improperly using the evidence that NatWest produces in its defense against the codefendant, as opposed to just purely looking at the evidence that Credit Lyonnais presents against the backdrop of the legal instructions that I'm going to be giving them concerning approximate cause, and scienter, and all of those legal

principles that they're going to have to apply, that's bothersome to me, because the consequences are huge here for everybody, for the plaintiffs, and for the defendants.

MR. TURNER: Of course, and that's why you have the job of having the discretion to do exactly what we're doing here today.

THE COURT: And the extra grey hairs.

MR. TURNER: That's exactly right. We have two issues that you have raised. One has to do with this allegation of potential conflict of interest and having to get new counsel; and the second, of course, is the spillover, what you refer to the spillover effect. First, with respect to the conflict of interest, I have not seen thus far articulated any rational reasoning as to what conflict exists. These cases have been going on now for a decade or more, and they've been consolidated for purposes of discovery. So there has been no surprise to either one of these banks that these cases were consolidated for purposes at least of discovery, but I'm not --

MR. FRIEDMAN: They were not.

MR. OSEN: I'm sorry, your Honor. I just want to make clear that the two cases were not -- Weiss -- I'm sorry.

THE COURT: Credit Lyonnais and NatWest were not -- it's easier to refer to them as defendants, as plaintiffs.

MR. OSEN: The two plaintiff groups were

consolidated in each case.

THE COURT: Right.

MR. FRIEDMAN: There's been no consolidation as between the banks. Eleven years later, it's the first time we're hearing about consolidation.

MR. TURNER: But there's also never been an order entered pertaining to the consolidation of trial order, the issue of --

THE COURT: That was never raised until now.

MR. TURNER: Exactly. So that's always existed as a possibility for a decade, because we're talking about the same events in both instances. So I don't think it's a credible argument to argue that we're surprised all of a sudden that any issue of consolidation has arisen after a decade of the litigation.

Secondly, with respect to the issue of conflict of interest, I'm in no position to evaluate the two banks' internal issues associated with who their attorney choice is. I can't comment on that issue, but what I can comment is that I looked very carefully for an articulated reason in the briefing as to what that conflict allegedly was and how it was so significant that it would rise to the level recognized under the law as being antagonistic. And that's the key, at least, according to the case law, is that there has to be an antagonistic aspect of it between the two defendants who are

seeking separate trials.

And antagonism has been defined universally in the cases, at least that I read, as blaming each other. That is considered antagonist. The fact that they had different defenses has never been considered, at least, according to the case law, as significant enough to demand separate trials. With respect to the second issue, the spillover, the so-called spillover issue, that's true in every case with multiple defendants. To give one example, I used to do defense work representing the medical industry. I have defended cases where I represented the hospital, two doctors, and three nurses. Each had different defenses. Each had different facts.

Each had different levels of involvement in the care and treatment of that particular patient, but I represented each one of them during the course of the trial. I have had cases as a plaintiffs' attorney, where defendants represented not only the manufacturer of the product but the supplier of the product and also the third party who modified the product. So I don't find it very compelling to argue that all of a sudden these two banks have decided they need to have different attorneys representing them at trial after a decade of this litigation and knowing where the litigation was headed, at least in terms of the attacks and the deposition testimony, the issues that were being raised.

So I think the tools that the Court has available in its discretion to use are more than adequate to protect those interests during the course of the trial.

THE COURT: What about the spillover effect?

MR. TURNER: The spillover effect is true with regard to all cases, just like the medical malpractice case I was mentioning.

THE COURT: Not if they're separate. They're not going to hear about what credit Lyonnais did or they're not going to hear what NatWest did.

MR. TURNER: Well, and I guess that's the point of my use of the medical malpractice case. There's always a chance that a nurse is going to get convicted in a medical malpractice case because of what the doctor did. That's always a concern, but in a medical malpractice case we don't have seven different trials of the same facts, trying them all separately because there's a concern of spillover. The system takes care of that with the tools provided.

THE COURT: But we do have them in some criminal cases where, for example, you have the kingpin being tried with the street-level dealer.

MR. TURNER: Exactly.

THE COURT: And so there have been instances where spillover is a consideration. But let me give the defense an opportunity to respond. I know we covered a lot of ground

here.

MR. FRIEDMAN: Let me go through that, your Honor. Your Honor already made many of my points, but let me go through this. But, first of all, I will say before Mr. Turner became actively involved, this case was scheduled for a trial involving Credit Lyonnais. The plaintiffs have been saying for ten years they want to try their claims against Credit Lyonnais first -- and it was only a couple of months ago that they first raised the question of consolidation -- and that they would try NatWest second.

My disagreement with my friend Mr. Turner is that this case was brought 11 years ago, and it's been litigated for 11 years as separate cases against two banks, so we're not talking about severance. This is the reverse of severance. This is a consolidation that has been sprung on us after 11 years. And there's never been a conflict concern now because I've never had to advocate for both banks at the same, time in front of the same jury, but now they're saying that I will need to, if they have it their way.

And your Honor is absolutely correct that the spillover effect would be tremendous, and I will articulate specific examples of the spillover effect -- your Honor has already articulated several of them -- that would result in grotesque prejudice, really grotesque, reversible prejudice to Credit Lyonnais and NatWest, because the facts go both ways.

There are some issues as to which the spillover effect will be harmful to Credit Lyonnais and some issues as to which the spillover effect will be harmful to NatWest. And the problem is --

THE COURT: Such as?

MR. FRIEDMAN: For example, your Honor raised two of the points. One thing that creates -- and there's no requirement in the case law that the defenses be antagonistic -- I don't know where that comes from -- or that one defendant is blaming another. It's that there is a tension between the defendants, and there are at least three respects in which there are tensions, and your Honor identified two of them. One is that Credit Lyonnais closed CBSP's accounts as soon as it learned of the OPAC (phonetic) designation we discussed in our CBSV as an SDGT.

THE COURT: You mean NatWest.

MR. FRIEDMAN: No, Credit Lyonnais. NatWest continued for years to serve its customer Interpal, after Interpal had been designated by OPAC as an SDGT, because, as your Honor found quite important, the Bank of England sanctioned, in the English equivalent of OPAC; it said that England had no objection. England was not aware of -- UK was not aware of evidence that precluded NatWest from continuing to serve Interpal.

So that's a respect in which Credit Lyonnais would

want to emphasize; that as soon as they learned of the OPAC designation, they immediately closed the account. Of course, no transfers had been done for over a year. And NatWest will want to justify its continued opening of the account, maintenance of the account, in the face of the OPAC designation for a couple of years, until this litigation made it untenable to continue to serve Interpal.

A second example is one your Honor identified. Your Honor found important that NatWest had consulted with the British authorities, and I would expect that -- advocating for NatWest before a jury trying NatWest, I would emphasize the fact that NatWest did all that it could to go to governmental authorities to get guidance. And, as your Honor pointed out, it could reflect poorly on Credit Lyonnais in front of the same jury that it didn't do that; but the Credit Lyonnais witnesses will explain amply why they didn't do that, and why in the French system that option was not available to them that was available to NatWest, unbeknownst to the other, in the English system.

So I would expect, wearing my NatWest hat, to be emphasizing the fact that NatWest went to the authorities, in -- wearing my Credit Lyonnais hat, I would be prejudiced by the jury hearing about what NatWest did, when we're forced -- as your Honor has said, the evidence relating to NatWest alone is completely irrelevant to Credit Lyonnais and completely

inadmissible as against Credit Lyonnais.

So what my friends are doing is trying to present before a single jury 50 percent of -- evidence that is inadmissible as against the other defendant, precisely to achieve that spillover effect and precisely to fill the gaps in their proof. Let's not kid ourselves; after 11 years it's no accident that plaintiffs have suddenly come up with this idea that they want to try the two banks together. It's because they recognize that perhaps the sum of trying the two banks together would be greater than the individual parts together.

There's a third specific instance I can cite, your Honor, in which the spillover effect would be highly prejudicial to the banks; and that is the fact that the approximate causation evidence -- although the same charities might be involved, the approximate causation evidence with respect to each bank is vastly different because of the timing of when the transfers were made. So, for example, credit Lyonnais' transfers ended in 2002. NatWest's transfers to the charities that are alleged to be HAMAS alteregos continued into 2005.

The evidence that their experts will present with respect to approximate causation for each scenario is vastly different because the status of the charity transferees changed during the interim period. So, for example, one of

credit Lyonnais' most important defenses is that none of the transferee charities -- the so-called HAMAS alteregos, none, none had been designated, had been sanctioned, by any country in the world as of the date of those transfers, including Israel. Now, Credit Lyonnais is going to emphasize that; no supervise to the defendants or to the Court.

NatWest, on the other hand, can't emphasize that, because NatWest's transfers continued into 2005, at which point, unbeknownst to NatWest. But still it's a fact some of those transferees were designated by Israel or by the United States. So those are three concrete examples where the spillover effect of a jury hearing evidence that is completely inadmissible, with respect to one of the two banks, would, nonetheless, instinctively, as your Honor put it, try to draw a comparison, no matter how many instructions your Honor gave.

And I sympathize with your Honor's predicament in giving instructions. Your Honor should not need to give instructions, should not want to give instructions, and, as the 2nd Circuit has said, in the *Malcolm* case and in the *Flintkote* (phonetic) case, where you have such a massive amount of evidence that would be inadmissible, as against one of the defendants, the judge can't be in the business of every ten minutes giving limine instructions.

So, your Honor, if we were to go forward with a consolidated trial, my clients would have a real problem, and

I would have a real problem, because I would need to advise them that there are real tensions and real issues with respect to my defending both of them at the same time, in front of the same jury. And, again -- as Mr. Turner may not know, because he was not actively involved in these cases at the time -- this is a total surprise. It was always understood for at least the last five or six years that plaintiffs would try their claims against Credit Lyonnais first and against NatWest second.

But, your Honor, there's an even more important point that I need to make, and that is the following: To allow the fact that the same evidence would be proffered with respect to HAMAS responsibility for the attacks, to allow that to drive the consolidation train would really be to allow the tail to wag the dog. And why do I say that? Because, as my friends conceded, their evidence of HAMAS responsibility, based on their Arab Bank experience, with 50 percent more attacks, took only four days; whereas, here, these cases will go on for weeks, about scienter and about approximate causation.

And what Mr. Turner did not tell your Honor -- but we all know is true -- the scienter case and Arab Bank was very short because Arab Bank was precluded from mounting a scienter defense, because of the evidentiary sanctions imposed by Judge Gershon, as a result of Arab Bank's failure to

produce documents. And, as your Honor knows, the 2nd Circuit was asked to mandamus Judge Gershon with respect to those evidentiary sanctions, and it declined to do so.

So there is no comparison between the scienter case for NatWest and the scienter case for Credit Lyonnais and the scienter case for Arab Bank. The scienter case for the plaintiffs and the Arab Bank case was a layout *[sic]* because the defendant was precluded from presenting scienter evidence. I, on the other hand, am going to present tens of witnesses, all of whom were deposed, both experts and officials, of the banks, whose testimony -- deposition testimony your Honor has already read.

In fact, your Honor -- and I have a slide with a bar chart that I can hand up, if your Honor wishes -- there are 53 witnesses who were deposed in these cases, both Credit Lyonnais, and each Credit Lyonnais or NatWest, that are completely non-overlapping. There are 24 non -- I'm sorry. There are 22 non-overlapping Credit Lyonnais fact witnesses, 7 non-overlapping Credit Lyonnais expert witnesses, 19 non-overlapping NatWest fact witnesses, 5 non-overlapping NatWest expert witnesses, for a total of 53.

THE COURT: How many experts for NatWest?

MR. FRIEDMAN: Five. So it's twenty-two, seven, nineteen, and five. How many overlapping fact witnesses are there? There is zero. There are zero overlapping fact

witnesses.

Now, going back to the point I was making, your Honor, if they can prove the HAMAS-responsibility part of their case in four days, to allow those four days of repetition -- and I'm going to come back to the fact that it's going to be less than four days, because your Honor has already made evidentiary rulings that will limit them to a much greater extent than Judge Cogan did. Judge Cogan disagreed with your Honor, with respect to the --

THE COURT: We do, on occasion.

MR. FRIEDMAN: I'm sorry?

THE COURT: We do on occasion disagree.

MR. FRIEDMAN: And your Honor to allow those four days of repetition, to drive the consolidation issue, would surely be to allow the tail to wag the dog, because there are going to be 20, 30, 40 days of trial on the scienter, as your Honor pointed out earlier, on the scienter and approximate causation cases. And the scienter and approximate causation cases for Credit Lyonnais and for NatWest are vastly different, and let me just come back to that briefly.

Again, just using the number of witnesses who were deposed as a proxy, they deposed 22 Credit Lyonnais fact witnesses and 7 Credit Lyonnais expert witnesses. There is no overlap with respect to any of those and NatWest, where they deposed 19 NatWest fact witnesses and 5 NatWest expert

witnesses.

I'm going to be bringing most of these people to trial, and the testimony is going to go on for weeks, I'm sorry to say. But, nonetheless, it will go on for weeks. And the spillover effect -- as I have already described and won't belabor -- of having the jury hear the NatWest scienter evidence, and the NatWest approximate causation evidence, and have the same jury hear the Credit Lyonnais scienter evidence and the Credit Lyonnais approximate causation evidence, the spillover effect, the prejudice of that, would be tremendous.

Because, as your Honor said this morning to plaintiffs' counsel, the jury instinctively would say, well, I heard NatWest did this; why didn't Credit Lyonnais do that? Or I heard Credit Lyonnais did this; why didn't NatWest do that? Whereas, that would be completely impermissible, and they agree that your Honor would need to instruct the jury not to engage in that type of comparative exercise, because the evidence about Credit Lyonnais is completely inadmissible with respect to NatWest, and the evidence with respect to NatWest is completely inadmissible with respect to Credit Lyonnais.

Coming back to the HAMAS responsibility case, the reason why I say that -- my friend's concession that it took them only four days to present that case in Arab Bank, with 50 percent more attacks, the reason I say it would take even less time here is that Judge Cogan allowed them to present

types of evidence in support of their HAMAS responsibility case that your Honor has already said they can't present.

For example, your Honor said that Mr. Shaked (phonetic) and Mr. Coleman cannot present opinions about HAMAS responsibility. They can't aggregate evidence because it's not something that is appropriate for expert testimony, and your Honor cited 2nd Circuit's Mejia decision in ruling that they could not do that. Judge Cogan disagrees. Secondly, your Honor has ruled that HAMAS claims of responsibility for the attacks are inadmissible hearsay because they're not statements against penal interest. Judge Cogan respectfully disagreed and allowed all of that evidence to come in.

Thirdly, Judge Cogan allowed eyewitnesses to the attacks to testify, even though in this case we have deposed all of the eyewitnesses that they proffered, and every one of them swore under oath that they have no idea who committed the attacks; and, therefore, all of that eyewitness testimony is inadmissible, as we plan to establish, if necessary, in an in limine motion. So, therefore, your Honor, plaintiffs HAMAS responsibility evidence in this case will be much shorter and will be much more document intensive than it was in the Arab Bank case.

But even if I allow my friends to rely on their Arab Bank experience as a proxy, to allow those four days to drive the analysis, when we're going to have tens of days on

approximate causation and scienter, would really stand reality on its head. And, again, as I said earlier, they can't use Arab Bank as a proxy with respect to the brevity of the scienter case, because Arab Bank was precluded from mounting a scienter defense. Let me make just two other points, your Honor. Actually, it's three other points, your Honor.

First of all, a consolidated trial would be far too long. If, as the parties estimated, each individual trial would be as much as two months, then a consolidated trial would be just shy of four months. Maybe four months less four days, if you believe what plaintiffs say about the non-repetition of the HAMAS responsibility evidence. That would make it exceedingly difficult to seat a jury for a consolidated case. To require people to be here for four months, it just would be far too long.

And because most of the evidence is non-duplicative -- none of the evidence, really, is duplicative, except with respect to HAMAS responsibility. A consolidated trial would not be much shorter than the combined duration of two individual trials, but, of course, with two individual trials, you would have two juries. Asking a jury to sit through a four-month consolidated trial, for a case that -- cases that have existed for 11 years without consolidation, in particular, is completely inappropriate.

Next, your Honor -- I think I've adequately covered

the conflict issue, which we alluded to in our letter to the Court. Again, I haven't discussed this issue with Mr. Turner, and I appreciate that he's not been privy to my consultations with my clients, but it's a real issue, and I take my ethical responsibilities, as we all do, very, very seriously.

And if your Honor were to say -- as I ask your Honor not to say, but if your Honor were to say that both banks have to appear before the same jury, despite the spillover effects, despite the non-duplication of evidence, despite the duration of that trial, then I do think my clients would be quite prudent to decide that they can't have the same counsel advocating their cases before a single jury. They can't have me -- to use my free examples, they can't have me saying look at Credit Lyonnais; closed the accounts as soon as OPAC designated its customer -- isn't that wonderful -- when NatWest, with reliance on the British government, continued to serve its designated customer for years.

They can't have me saying, oh, look at NatWest; they consulted with the English government, what were they to do, when at the same time Credit Lyonnais did not do that. Credit Lyonnais witnesses have explained and can explain to a jury why they didn't do that. But it's not fair to have -- and prejudicial, a word that my friends did not use a lot in their presentation, prejudicial, which is the keystone of the

analysis. It would be prejudicial to have a jury compare the two parties in that way.

And, finally, your Honor, with respect to damages, in their motion letter, my friends invoked a question of whether there should be consolidated damages trials. That's an issue for another day. Perhaps consolidation will be appropriate if both defendants are found liable. I hope there won't be a need for a damages case, because neither defendant will be found liable. And if only one of the defendants is found liable in two separate trials, then consolidation will be moot. There will be just one damages trial.

But, again, its a bit of a bootstrap, especially with the plaintiffs having proposed eight years ago, now that liability and damages be bifurcated, for them to say somehow damages issues implements this question. If your Honor would like, I can hand up the bar chart with those numbers.

THE COURT: Has plaintiffs' counsel seen this bar chart?

MR. FRIEDMAN: They haven't.

THE COURT: Would you show it to them, please.

MR. FRIEDMAN: And I have the individual names for your Honor.

Your Honor. In sum, the analysis is, according to the 2nd Circuit, is you balance the efficiency gain with the -- of consolidation with the prejudice that would be

caused as the result of consolidation. Here, my friends have conceded the efficiency gain would be, at most, four days of non-repeated HAMAS responsibility evidence. And I can tell your Honor quite sincerely that these trials would be overwhelmingly about scienter and about approximate causation.

And the prejudice that would befall my clients if they had to present their scienter and approximate causation defenses, or if the jury heard the scienter and approximate causation, proof of the plaintiffs, the prejudice would be overwhelming. And, you know, your Honor, it's a little unfair for me to have said that you balance the efficiency against the prejudice. First of all, you don't even get in the consolidation door unless you can show substantial efficiency. And, here, I submit that the plaintiffs can't even do that; they can't even show that there would be a substantial efficiency gain as the result of consolidation.

But the 2nd Circuit again -- and we cited to your Honor and call to your Honor's attention again the 2nd Circuit's rulings in the *Malcolm* case and in the *Flintkote* case, where -- for example, in *Malcolm,* the 2nd Circuit said the benefits of efficiency can never be purchased at the cost of fairness. And the *Flintkote* court said that consolidation is particularly inappropriate where the introduction of large amounts of evidence that is relevant to one defendant but irrelevant and inadmissible as to others risks confusing the

jury.

Your Honor already put her finger on it this morning here, the prejudice, the risks of jury confusion. In fact, from your Honor's perspective, as your Honor said, the need for your Honor to constantly intervene in the presentation of evidence and to say, look, you can't consider this with respect to one bank or the other, and your Honor would have to do that for weeks on end, because these cases will be overwhelmingly about scienter and approximate causation and only minimally about HAMAS responsibility. Thank you for your patience, your Honor.

THE COURT: Thank you all very much. I am going to -- I plan on issuing a decision fairly quickly, and I'm hopeful by the first week of October.

And, madam reporter, I'd like to get a copy of these proceedings.

Yes, sir.

MR. OSEN: If I may, just one additional point.

THE COURT: Briefly.

MR. OSEN: Not about the argument, your Honor, but it's my understanding -- and defense counsel can correct me, and we'll confer afterwards. When we recheck this docket after 11 years, it appears that there was a bifurcation order entered with respect to discovery but not with respect to the trial. And just to correct Mr. Friedman, it was the

defendants that asked for bifurcation in June of 2008.

THE COURT: Of damages, you mean, not liability.

MR. OSEN: I'm sorry. Yes. Between liability and damages. So liability and damages discovery were bifurcated in the magistrate judge's order on pretrial discovery, but we couldn't find -- and maybe we missed it -- an order relating to bifurcation of damages and liability for either case at trial.

MR. FRIEDMAN: I think it should be a nonissue, because the parties agree that there is such a bifurcation, and --

MR. OSEN: We never agreed, your Honor, except with respect to discovery, as far as we can tell in the record.

MR. FRIEDMAN: Your Honor, I can dig out the correspondence. And Mr. Osen and I have known each other now for many years. But it was agreed, and I have it in writing, that damages discovery would take place after a liability trial, so there can be no ambiguity about that, that liability and damages were bifurcated for trial too because we have correspondence. And I won't bore your Honor with a debate about whose idea it was, although I'm quite confident it was plaintiffs who proposed it, but Mr. Osen has a different recollection. So be it. It doesn't matter.

The fact that the parties agreed that damages discovery would take place after a liability trial, except

with respect to the so-called designated plaintiffs that you identify, means of necessity that liability and damages were bifurcated for purposes of trial too.

MR. OSEN: Your Honor, I'm not here to argue that issue. I just wanted to draw your attention to it because we couldn't find an order with respect to trial and bifurcation on the docket. I may be mistaken. We're going to go back. I obviously will confer with Mr. Friedman on it. It was somewhat surprising to us.

THE COURT: It will be helpful to the Court, since you've raised that opinion, within a week, after both counsel have had an opportunity to review the docket, just a simple joint letter, just to let me know to that effect whether or not there in fact is such an order. I think that's easy enough. I would think that it makes sense to have a bifurcation of damages from liability, and to the extent that there is -- I do think that damages discovery was held off during -- there was a substantial amount of discovery that had to be done. I remember going through the summary judgment motions. There was a ton of discovery, a ton of exhibits to go through, so it certainly made sense to do that.

MR. FRIEDMAN: Your Honor, I'm not really sure what the issue is. I think --

THE COURT: To the extent I think that counsel is requesting, and it might be -- I like a clean docket, so --

MR. FRIEDMAN: Maybe we can propose -- I think we agree that trial is bifurcated as to liability and damages, because there hasn't been damages discovery.

THE COURT: Right.

MR. FRIEDMAN: And if we can propose an order that we consent --

THE COURT: Or a stipulation that I can so order.

MR. FRIEDMAN: -- that memorializes that, we can discuss it.

MR. OSEN: The reason I raised it, your Honor, is because to the extent that the issue comes up with respect to the consolidation issue we're here today, the timing and additional waste of money, resources, etcetera that results from having ceriodum (phonetic) damages trial or waiting for a damages trial, while we have --

THE COURT: We can do one trial immediately after the other. We'll be a bunch of tired litigators and a tired judge, but that's okay. That's what we're here for.

MR. OSEN: The only thing I would say is that, at least in our experience in Arab Bank following the trial -- and I would expect Mr. Friedman would do the same in this case -- is if there was a liability verdict, we would expect a vigorous briefing under Rule 50 and 59. That basically takes another year before you get a ruling after a full briefing schedule on that, which then affects how the parties proceed

on the next trial. As a practical matter --

THE COURT: Maybe. Maybe not. I don't know why that should necessarily affect the next trial.

MR. OSEN: Well. Because --

THE COURT: That's assuming. Again, I'm putting the cart before the horse. But for argument sake, if we have two separate trials, so we do one liability trial, and then we do the next liability trial, because there may or may not be liability. You don't know. I will never bet on what a jury is going to do. Who does that is a fool. We're just -- like to make crazy bets. I don't know. But I would think that doing that, there could always be an adjustment with the schedule for damages discovery. And, besides, you're still talking about damages from one different entity versus another entity.

MR. OSEN: Yes, but, at that point, assuming there was liability in both cases, the damages would be what they are irrespective of the defendant. In other words, the proffer wouldn't depend on the defendant.

THE COURT: So we're talking about waiting another two months until after the second liability trial is done?

MR. FRIEDMAN: Well, we have to do --

THE COURT: And, as you said, there's going to be post-verdict motions, so --

MR. FRIEDMAN: We also have to do damages discovery.

THE COURT: And damages discovery. So I'm not -- I don't think that in the scheme of things that that's a more worrisome concern.

MR. OSEN: Thank you, your Honor.

THE COURT: But, in any event, if you wanted to make sure that we have a clear docket on that issue, if you want to send me a joint letter, say, by the 22nd, next week, just to let me know that. And then if you want to do it by way of stipulation, that's fine, but I can so order a proposed order. That's fine. Whichever way you all agree is most expedient.

I want to thank all of you. As usual, it is always a pleasure to have oral argument in this case, in these cases. It's always a pleasure to have attorneys who really know their case and are so thoroughly prepared.

MR. OSEN: I'm sorry, your Honor.

THE COURT: Yes, Counsel.

MR. OSEN: One last thing, we have a couple of PowerPoint slides which reiterate the numbers that we gave you.

THE COURT: I really don't -- I don't feel that that is going to be necessary for my analysis.

MR. OSEN: That's fine, your Honor.

THE COURT: But I appreciate the offer.

MR. FRIEDMAN: Thank you, your Honor.

THE COURT: Okay. Thank you. All very much.

(Proceedings adjourned.)

* * *

I certify that the foregoing is a true and correct transcription of the record from proceedings in the above-entitled case.

/s/ Nicole Canales
Nicole Canales

September 22, 2016
Date